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 Charles J. Reilly, :  
 Plaintiff, :  
 :  
 v. : CIVIL ACTION  
 : NO. 98-CV-1648  
 Keystone Health Plan :  
 East, Inc., :  
 Defendant. :  
 :

The plaintiff, Charles J. Reilly ("Reilly") is the President of the Reilly Foam Company. See First Am. Compl. ¶ 5.1. Keystone is a health maintenance organization that has provided Reilly coverage under a group health plan. See First Am. Compl. ¶¶ 5.2, 7-7.2. Reilly suffers from "spasmodic torticollis." First Am. Compl. ¶ 9.1. It causes "sustained muscle spasms/contractions . . . ." First Am. Compl. ¶ 9. The dispute

arises from Keystone's decision to stop covering Reilly's medical treatment for spasmodic torticollis. See First Am. Compl. ¶¶ 11-14.5.

On December 23, 1997, Reilly sued Keystone in the Montgomery County Court of Common Pleas. Keystone removed the case to this court on March 27, 1998 on the ground of preemption under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 et seq.

## **II. DISCUSSION**

### **A. Motion to Dismiss**

The court may dismiss a complaint pursuant to Rule 12(b)(6) "only if it is clear that no relief could be granted under any set of facts that could be proved consistent" with the complaint's allegations. Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed2d 59 (1984). The court must accept all factual allegations as true and draw all reasonable inferences from such allegations in the light most favorable to the plaintiff. See Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 (3d Cir. 1994); Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). On a motion to dismiss, the court may focus only on the complaint, "matters of public record, orders, exhibits attached to the complaint and items appearing in the record of the case." Oshiver, 38 F.3d at 1384, n.2; accord Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d

1192, 1196 (3d Cir. 1993), cert. denied, 510 U.S. 1042 (1994).

If matters outside the pleading are presented to and not excluded by the court, the court shall treat a motion to dismiss as one for summary judgment disposed of as provided in Rule 56. See Fed.R.Civ.P. 12(b); Hilferty v. Shipman, 91 F.3d 573, 578 (3d Cir. 1996). Prior to converting a motion to dismiss into a motion for summary judgment, the court must provide adequate notice to the parties. See Rose v. Bartle, 871 F.2d 331, 342 (3d Cir. 1989).

Keystone attached evidentiary material to its motion to dismiss. See Keystone's Mot. Ex. B. To avoid converting the motion to dismiss into a motion for summary judgment, the court will not consider this material.

#### **1. First Amended Complaint's Timeliness**

Keystone initially asserts that the first amended complaint is untimely. Keystone's Mot.<sup>1</sup> ¶ 1. Rule 15(a) of the Federal Rules of Civil Procedure states "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . ." Fed.R.Civ.P. 15(a). A motion to dismiss is not a responsive pleading. See Sun Co., Inc. (R & M) v. Badger Design & Constructors, Inc, 939 F.Supp.

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<sup>1</sup> Keystone's Rule 12(b)(6) Motion to Dismiss the Plaintiff's First Amended Complaint for Failing to Set Forth a Claim upon which Relief May Be Granted or Alternatively Rule 12(f) Motion to Strike Portions of the First Amended Complaint will be referred to as "Keystone's Mot."

365, 367 n. 3 (E.D.Pa. 1996); Schnabel v. Bldg. & Constr. Trades Council of Philadelphia, 563 F.Supp. 1030, 1035 (E.D.Pa. 1983); see also, 3 James Wm. Moore et al., Moore's Federal Practice § 15.11 (3d ed. 1998) (defining the term "responsive pleading" by referring to Rule 7(a) "which distinguishes between pleadings and motions, and provides an exclusive list of what is a pleading: a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third party complaint, and an answer."). Since Keystone had not filed a responsive pleading, the first amended complaint is timely.

## **2. Definition of "Administrator"**

Keystone argues that it does not fit the definition of "administrator," under ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A).<sup>2</sup> Keystone's Mot. ¶ 3. Keystone contends that since it is not an administrator, it is only subject to ERISA § 502(a)(1)(B), the denial of benefits provision, 29 U.S.C. §

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<sup>2</sup> 29 U.S.C. § 1002(16)(A) defines the term "administrator" as:

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not so designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

29 U.S.C. § 1002(16)(A).

1132(a)(1)(B)<sup>3</sup>. Keystone's Mot. ¶ 4; Keystone's Mem.<sup>4</sup> at 2-3. Keystone, therefore, takes the position that it is subject to neither ERISA § 502(a)(1)(A), the provision relating to an administrator's refusal to supply requested information, 29 U.S.C. § 1132(a)(1)(A)<sup>5</sup>, nor ERISA § 502(a)(3), the provision relating to breaches of fiduciary duty, 29 U.S.C. § 1132(a)(3)<sup>6</sup>.

Determining whether Keystone is an administrator under ERISA is irrelevant. Reilly does not request relief under ERISA § 502(a)(1)(A). Moreover, ERISA § 502(a)(3) does not mandate that causes of action for a breach of fiduciary duty can only be brought against an administrator. See 29 U.S.C. 1132(a)(3); Curcio v. John Hancock Mut. Life Ins. Co., 33 F.3d 226, 233 (3d

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<sup>3</sup> 29 U.S.C. § 1132(a)(1)(B) allows a participant or beneficiary to sue "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan[.]" 29 U.S.C. § 1132(a)(1)(B).

<sup>4</sup> Keystone's Memorandum of Law in Support of Their Rule 12(b)(6) Motion to Dismiss the Plaintiff's Complaint for Failing to Set Forth a Claim upon which Relief May Be Granted or Alternatively Rule 12(f) Motion to Strike Portions of the First Amended Complaint will be referred to as "Keystone's Mem."

<sup>5</sup> 29 U.S.C. § 1132(a)(1)(A) provides that a participant or beneficiary may sue for relief for an administrator's refusal to supply requested information. 29 U.S.C. § 1132(a)(1)(A).

<sup>6</sup> 29 U.S.C. § 1132(a)(3) permits a participant or beneficiary to sue to "enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]" 29 U.S.C. § 1132(a)(3).

Cir. 1994) (noting that ERISA broadly defines a fiduciary). Consequently, it is unnecessary to decide at this point whether Keystone is an administrator.

### **3. Definition of "Fiduciary"**

Keystone also contends that it is not a "fiduciary" under ERISA § 3(21), 29 U.S.C. § 1002(21),<sup>7</sup> because Keystone merely provides the health benefits under Reilly's plan. Keystone's Mot. ¶ 5; Keystone's Mem. at 3. Thus Keystone argues that Reilly cannot sue it under ERISA § 502(a)(3). Keystone's Mem. at 3.

Although ERISA broadly defines fiduciary, see Curcio, F.3d at 233, the Court of Appeals for the Third Circuit has not ruled whether persons who exercise discretionary authority or responsibility in granting or denying claims are fiduciaries under ERISA. Several courts have found that if an insurance company has the authority to grant or deny claims, it is an ERISA fiduciary. See, e.g., PacifiCare Inc. v. Martin, 34 F.3d 834,

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<sup>7</sup> 29 U.S.C. § 1002(21) provides:  
a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.  
29 U.S.C. § 1002(21).

837 (9th Cir. 1994); Libbey-Owens-Ford Co. v. Blue Cross and Blue Shield Mut. of Ohio, 982 F.2d 1031, 1035 (6th Cir. 1993); see also, Arber v. Equitable Beneficial Life Ins. Co., 889 F.Supp. 194, 199 (E.D.Pa. 1995) (finding that plaintiffs, who had averred defendant controlled funds used to pay claims and had discretionary authority to determine whether a medical expense is covered, adequately pleaded that defendant "is a fiduciary in at least some areas, so as to bring a claim for breach of fiduciary duty . . . ."); see generally, James F. Jorden et al., Handbook on ERISA Litigation § 3.02[B][1][a][i] (2d ed. 1997 & Supp. 1998) ("Persons who exercise discretionary authority or responsibility in granting or denying claims for benefits or who exercise discretionary authority with regard to other questions of benefit entitlement or eligibility will be fiduciaries."). Here, the first amended complaint alleges that the dispute in part involves Keystone's alleged wrongful denial of Reilly's claims for medical benefits. Therefore, Reilly sufficiently pleaded that Keystone is a fiduciary. The motion to dismiss will be denied.

#### **B. Motion to Strike**

In the alternative, Keystone moves to strike portions of the first amended complaint pursuant to Rule 12(f) of the Federal Rules of Civil Procedure because Keystone is neither an administrator nor a fiduciary under ERISA. Keystone's Mot. ¶¶ 6, 7; Keystone's Mem. at 3-4. Rule 12(f) permits the court to

strike "from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed.R.Civ.P. 12(f). As noted above, Reilly has adequately pleaded that Keystone is an ERISA fiduciary. Accordingly the motion to strike will be denied.



IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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	:	
Charles J. Reilly,	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 98-CV-1648
Keystone Health Plan	:	
East, Inc.,	:	
Defendant.	:	
	:	

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**ORDER**

AND NOW, this \_\_\_\_ day of \_\_\_\_\_, 1998, upon consideration of Defendant Keystone Health Plan East, Inc.'s motion to dismiss and alternative motion to strike, and Plaintiff Charles J. Reilly's opposition thereto, it is hereby

**ORDERED** that:

(1) Defendant Keystone Health Plan East, Inc.'s motion

to dismiss the first amended complaint under Rule 12(b)(6) is DENIED.

(2) Defendant Keystone Health Plan East, Inc.'s alternative motion to strike portions of the first amended complaint under Rule 12(f) is DENIED.

**BY THE COURT**

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**JOSEPH L. MCGLYNN, JR. J.**